STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2003
v	No. 238740 Saginaw Circuit Court
JOSEPH VINCENT MORALES, Defendant-Appellant.	LC No. 01-020350-FC

Before: Talbot, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of conspiracy to commit first-degree premeditated murder, MCL 750.316(1)(a), MCL 750.157a; three counts of attempted murder, MCL 750.91; conspiracy to commit arson, MCL 750.157a; arson, MCL 750.72; conspiracy to possess a Molotov cocktail, MCL 750.157a; and three counts of possession of a Molotov cocktail causing physical injury, MCL 750.211a(2)(c). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life imprisonment for conspiracy to commit first-degree premeditated murder. Defendant was also sentenced to concurrent terms of thirty to sixty years on each of the remaining charges.

Defendant first argues that the prosecution did not prove all elements for the charge of conspiracy to commit murder beyond a reasonable doubt. We disagree.

An appeal based on a claim of insufficient evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670; ____ NW2d ____ (2002). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

> Conspiracy is defined by common law as a partnership in criminal purposes. Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense. Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the

> unlawful agreement meaning the crime is complete upon formation of the agreement.
>
> The specific intent to combine, including knowledge of that intent, must be shared by two or more individuals because there can be no conspiracy without a combination of two or more. This combination of two or more is essential because the rationale underlying the crime of conspiracy is based on the increased societal dangers presented by the agreement between the plurality of actors. [*People v Hermiz*, 462 Mich 71, 786, n 12; 611 NW2d 783 (2000), quoting *People v Justice*, 454 Mich 334, 345-346; 562 NW2d 652 (1997).]

In particular, defendant urges that the prosecution did not prove either of defendant's co-conspirators had the specific intent to commit murder. "To prove a conspiracy to commit murder, it must be established that each of the conspirators have the intent required for murder and, to establish that intent, there must be foreknowledge of that intent." *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981). There was ample evidence from one co-conspirator that he understood ahead of time that defendant planned to commit murder and that he willingly participated in defendant's plan. Defendant's argument that the co-conspirator could not have formed the intent to murder because the co-conspirator did not know whether anyone was home is not dispositive. "The crime of conspiracy punishes the 'planning' of the substantive offense; [not] the actual commission of the crime." *Id*. at 103, citing *People v Berry*, 84 Mich App 604; 209 NW2d 694 (1978).

Defendant also argues that the prosecution did not prove there was an agreement between defendant and either co-conspirator. We disagree.

One of defendant's co-conspirators testified that he watched while defendant prepared the Molotov cocktails. He then rode with defendant to a residential neighborhood where defendant parked the car, and they both took a Molotov cocktail. They walked to a house where defendant lit the pieces of towel sticking out of the bottles. They threw their bottles at the house at the same time. Then they ran back to where the car was parked and drove off. All these actions, presumably without words, clearly show an agreement to do something. With regard to defendant and this co-conspirator, there was sufficient evidence of foreknowledge and plan.

Defendant next claims that his convictions of conspiracy to murder and attempted murder should be reversed because of a witness' reference to a polygraph test in front of the jury. Defendant urges that because the witness' plea bargain was known to the jury, the jury could have inferred that the witness had passed the polygraph test. Defendant claims the curative instruction from the judge was not sufficient. The testimony of this witness was the most incriminating against defendant regarding the conspiracy to commit murder charge. Defendant states that the jury likely gave more credence to this witness' testimony because of the reference to the polygraph and may have based its guilty verdict on this witness' testimony. We disagree.

In reviewing the trial court's denial of a motion for mistrial, this court reviews for an abuse of discretion. *People v Nash*, 244 Mich App 93; 625 NW2d 87 (2000). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the

trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

In *Nash*, *supra*, we listed factors to consider when deciding whether reference to a polygraph in front of a jury requires reversal. These factors are:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*Id*. at 98, quoting *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).]

In this case, defendant promptly objected and sought a mistrial. The jury was instructed to disregard the last question and answer. The mention of the polygraph came after questions by defense counsel referring to other police officers that had interviewed the witness. In those questions, defense counsel had asked the witness to identify an officer. The reference to the polygraph appeared to be an attempt to identify that police officer and was not responsive to defense counsel's question. "Generally, 'an unresponsive, volunteered answer to a proper question is not grounds for granting of a mistrial.'" *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), quoting *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992).

The witness made only one reference to a polygraph. The witness did not state that he was given a polygraph test or that he had passed the polygraph test. The reference to the polygraph did not appear to be an attempt to bolster his credibility. Moreover, the results of the polygraph were not admitted. Only the fact that a polygraph test had been conducted was admitted, and this fact did not identify who had been given the test.

Defendant cites *Nash*, *supra* at 101, in his argument that the "exam results could easily be (incorrectly) implied from the manner of the witness's testimony." However, the facts in *Nash* are distinguishable.

In *Nash*, *supra* at 98-101, the reference to the polygraph took a much more significant role in the case. The reference was invited by the prosecution. The prosecution's key witness had passed the polygraph test. The prosecutor, in an attempt to bolster the witness' credibility, had asked why she should be believed. Her response was, "That's up to you. I took a lie detector test." *Id*. at 95. This Court explained, "[A]lthough the witness' response to the prosecutor's question only referenced taking the polygraph test and not the results of the test, it can hardly be said that the result was not implied. Had the witness not passed the lie detector test, she would not have responded, effectively, that she should be believed on the basis of the results of the lie detector test." *Id*. at 101. Furthermore, the court reporter had replayed the witness' testimony to the jury during deliberations, including the portion referring to the polygraph.

While defendant objected immediately and sought a mistrial in the present case, the reference appeared inadvertent, only occurred once, and was not made to bolster the witness'

credibility. The results and subject of the test also were not revealed. Considering the facts on which the trial court acted, it did not abuse its discretion when it denied defendant's motion for a mistrial. *Id*. at 98.

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Peter D. O'Connell